

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

MARSH SUPERMARKETS, INC.
Employer

and

Case 25-RC-10500

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 700
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held July 20, 2010, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.¹

I. ISSUE

The United Food and Commercial Workers Union Local 700 (hereinafter the "Petitioner") seeks an election within a unit comprised of all full time and regular part time employees employed by Marsh Supermarkets, Inc. (hereinafter the "Employer") at the Employer's Store #42 located at 1815 Albany Street, Beech Grove, Indiana.

The only issue raised by the parties is whether the department managers are statutory supervisors and/or managerial employees as defined by the Act.² The Employer contends that the eight department managers are supervisors within the meaning of Section 2(11) of the Act and/or managers under the Act and are thus ineligible to vote in the election. More specifically,

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.
- c. The Petitioner is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

² All parties were given an opportunity to submit a post-hearing brief. The Employer was the only party to submit a brief. In its brief, the only issue raised was whether the eight department managers are statutory supervisors or managerial employees.

the Employer alleges that the individuals holding the following positions are ineligible to vote in the election due to their supervisory and/or managerial status: Office Manager, Produce Manager, Deli/Bakery Manager, Meat Manager, Dairy/Frozen Manager, Floral Manager, General Merchandise Manager, and Grocery Manager.

The Petitioner seeks to represent all regular full-time and part-time employees employed by the Employer located at 1815 Albany Street, Beech Grove, Indiana. The Petitioner contends that the eight department managers are not statutory supervisors and thus should be included in the unit found appropriate.

II. DECISION

The evidence produced at the hearing was insufficient to establish that any of the Employer's eight department managers discipline employees or effectively recommend discipline. Moreover, the evidence was insufficient to establish that any of the eight department managers responsibly direct employees or assign work using independent judgment. In addition, the evidence was insufficient to establish that any of the eight department managers affect terms and conditions of employment for employees based on evaluations. Furthermore, the evidence was insufficient to establish that any of the eight department managers were managerial employees. Based on these factors, I find that the department managers, with the exception of the meat department manager and the deli/bakery department manager as discussed below, are not statutory supervisors or managerial employees and thus are eligible to vote in the election. However, although the evidence was insufficient to establish that other department managers could effectively recommend applicants for hire, the record did bring into question the authority of the meat department manager and the deli/bakery department manager on this matter. Therefore, I shall allow the meat department manager and the deli/bakery department manager to vote subject to challenge.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by the Employer at its facility located at 1815 Albany Street, Beech Grove, Indiana; BUT EXCLUDING floaters, specialists, and guards and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 44 employees for whom no history of collective bargaining exists.

III. STATEMENT OF FACTS

A. Background Information

The Employer is engaged in the business of operating a grocery store located at 1815 Albany Street, Beech Grove, Indiana. The store is referred to as Store #42. The Employer has

certain policies set by Marsh Supermarkets, LLC (also referred to as “Corporate”)³. The Employer is open from 6:00 a.m. until midnight. Employees punch in and out through an automated time clock system. Full-time employees work in excess of 32 hours or more a week. Part-time employees work a maximum of 32 hours a week. Employee classifications consist of the store manager, co-managers, department managers, assistant department manager, full-time clerks, part-time clerks, head cutter/journeyman, wrapper/part-time clerk, apprentice, cashiers, floaters, and specialists.⁴

Wages are determined based on a progression with experience being taken into account. The wages for a starting clerk position is about \$7.55/hour with an increase to \$7.80/hour within a year. After a year, a clerk can be promoted into a department. A produce clerk wage is about \$8.00/hour. An employee who works in the deli department makes about \$8.05/hour. The top wage rate in the meat department is about \$13.00 to \$14.00/hour. Usually, the pay difference from a cashier to an office clerk is about 10 to 15 cents per hour. A promotion into the meat department has a similar pay increase as that of a cashier transferring to an office clerk. Employees receive vacation time based on the number of hours worked the previous year. Employees also receive health insurance.

The highest ranking position within the store is the store manager. This position is held by Russ Bechtel.⁵ Bechtel has worked for the Employer for about 20 years but has only worked at Store #42 for about a year and a half. Within the time period that Bechtel has served as store manager for Store #42, he has hired and promoted employees in various positions. Bechtel has the authority to evaluate the department managers but has not done so at Store #42. Neither party contends that the store manager should be included in the unit. Based on the record evidence, I find that the store manager is a 2(11) supervisor as defined by the Act and is excluded from the unit.

There are two co-managers who report to the store manager. The parties stipulate and I find that the co-managers have the authority and have exercised said authority to hire, fire, and discipline employees and thus are 2(11) supervisors as defined by the Act.⁶ They are responsible for operational issues within the store. More specifically, William Boler is the grocery or merchandising co-manager and he oversees the center store departments - dairy/frozen, grocery, and general merchandise departments. Mark Wortman is the service co-manager and oversees service operations of the front-end of the store. The store manager and/or co-managers are at the facility from about 7:00 a.m. until 9:00 p.m.

The store manager, co-managers, and department managers obtain corporate training

³ The Employer is associated with Marsh Supermarkets, LLC which is referenced only to the extent that such entity sets certain corporate policies and standards. Notably, the Petitioner only seeks to represent the petitioned-for employees at the single-facility located at 1815 Albany Street, Beech Grove, Indiana. No issue was raised pertaining to the appropriateness of the petitioned-for employees at the single facility.

⁴ In a post-hearing stipulation, the parties agreed that the assistant managers should be included in any unit found appropriate. However, the parties also agreed that the floats and specialists should be excluded from any unit found appropriate.

⁵ Bechtel is the only witness to testify in this proceeding.

⁶ In a post-hearing stipulation, the parties stipulated that the co-managers are excluded from any unit found appropriate.

related to rules, policies, legal matters, food preparation, food borne illnesses, health issues, OSHA requirements, and harassment. The department managers are responsible for the operations and merchandising of their respective departments. The day department managers typically work from 7:00 a.m. until about 4:00 p.m. or 5:00 p.m. The record indicates that the grocery manager has different hours and works “overnight”; however, the record does not state his specific work hours.

B. General Duties of the Department Managers⁷

Store #42 is subdivided into the following eight departments: Front Office, Produce, Deli/Bakery, Meat, Dairy/Frozen, Floral, General Merchandise, and Grocery. Each department has a department manager. The job descriptions for managers in the office, general merchandise, produce, grocery, and deli departments state that said departments are operated based on guidelines as established by Marsh Supermarkets, LLC. According to Bechtel, these guidelines apply to all aspects of the job, including ordering, shrinkage, merchandising, and profitability.

Department managers are responsible for ordering products and supplies and for properly displaying the products. They also oversee when products are received and unloaded. They are responsible for unloading the trucks or may delegate this task to employees within their respective departments. Notably, the department managers spend about 50% of their time on the floor working, with the exception of the office manager. The record notes that they also spend a certain amount of time in a shared office designated for department managers. According to Bechtel, department managers also use a portion of their day instructing employees on what work to perform. The record is insufficient to establish that department managers discipline employees for not performing the assigned tasks.

The record indicates that the Employer has a progressive disciplinary procedure. Discipline may consist of a verbal or written write-up, layoff, and then discharge depending on the violation. Bechtel testified that department managers can discipline employees or recommend it. However, no evidence was offered into the record pertaining to specific discipline issued by a department manager. Notably, Bechtel stated that he can overturn department managers’ disciplinary decisions. It is unclear from the record at what point disciplinary action is finalized. Moreover, Bechtel testified that he engages in certain employment actions (hire, discipline, and promotions) based on recommendations from department managers but he also stated that he conducts an independent investigation when it comes to said actions. The record evidence is insufficient to establish that the store manager’s employment actions have actually been based on department managers’ recommendations.

Bechtel testified that department managers participate in the hiring process by recommending applicants and by conducting interviews. After employees are hired, the employees are placed on a 60 days probationary period. According to Bechtel, the department managers then evaluate the employees to determine if that employee will remain employed. The evaluation will cover attendance, attitude, service level, and interaction with co-workers and customers. If an employee receives a favorably evaluation, then that employee remains

⁷ The record evidence contains job descriptions for each department manager. Bechtel’s un rebutted testimony indicates that the job descriptions accurately describe the job duties of each department manager.

employed. Otherwise, an employee may be counseled or released from employment. However, no evidence was presented that any department managers actually conducted evaluations of probationary employees. The record further shows that department managers have not conducted formal appraisals for employees. Rather department managers, informally tell employees “you’re doing fine; keep up the good work; good job”. There is no evidence that employees receive any form of reward based on these verbal accolades.

According to Bechtel, department managers approve time off request. For instance, an employee typically would verbally request vacation to the department manager. The manager may approve or deny the vacation request. The denial of a leave request typically occurs if it is in the middle of a holiday, an inventory, and/or an event that would be detrimental to the department. The record is not clear whether department managers have any discretion in determining whether to approve or deny a request or if the decision is made based on store policy. Notably, there was no specific evidence introduced in the record pertaining to department managers exercising the authority to grant or deny time off requests.

Bechtel testified that work schedules are prepared by the store manager, co-managers, and department managers. In preparing the schedules, the sales budget and employees’ availability and skills/positions are considered. An employee earns a break for a four-hour shift. Employees will also receive a lunch break depending on the number of hours worked. Breaks are taken based on service needs. More specifically, the evidence reveals that Wortman, the service co-manager, prepares the schedule for the front end and office department, which consist of the cashiers, office clerks, and the office department manager. Wortman utilizes a computerized program to generate the schedule and puts in parameters such as the employee’s name, availability, job function, and leave request. Wortman obtains this information from the office manager. The record is devoid of evidence on whether the office manager is merely reporting leave requests to Wortman or leave request that she has already approved. From this information, the computer generates a work schedule that includes the number of breaks an employee will receive. The office manager or clerks inform front end employees when it is time to take breaks. Boler, the grocery and merchandising co-manager prepares the schedules for the dairy/frozen, general merchandise, and grocery departments. These managers will inform Boler of employees’ availability, such as whether an employee has asked for vacation. Again, it is not clear from the record whether department managers are reporting vacation request or approved vacation time. Notably, the department managers may prepare their own schedules. The produce manager, meat manager, deli/bakery manager, and floral manager prepare the schedules for their departments. They also determine how many hours to schedule part-time and full-time employees.

Department managers are responsible for training new employees as well as training employees on changes in rules and laws. Department managers are provided tools by the company, such as videos and CDs. There is no evidence that department managers independently compose materials for training. The training consists of technical issues, safety issues, and workplace behavior. Managers use company-prepared visual aids and perform some hands-on training. Managers determine the duration of new employee training and oversee the on-going training of employees.

C. Front Office Manager

The front office department consists of the front office manager, six office employees, four to five service clerks, and 10 cashiers. The office manager, Marcia Bookout, is under the supervision of the service co-manager, Wortman, and the store manager. The office handles the money for the store with the exception of the evening drops. The evening drops are typically handled by the store manager or co-manager and sometimes the grocery manager. The record discloses that the office manager tracks how much money is in the store at any given time and the daily sales figures. The office manager also manages what money is coming in and going out of the store. The office manager is responsible for the electronic bookkeeping system. She is also responsible for maintaining all necessary records, account receivables, cashier overages and shortage, bad checks, etc. Moreover, she is responsible for the accuracy of the time keeping system and having it set for Corporate to automatically pull the information.

According to the job description, the office manager is responsible for the operation of the office and front-end as established by Marsh Supermarkets, LLC. The record discloses that employees in the office, including Bookout, know their job duties because they are based on established procedures and policies. The record evidence reveals that the Employer utilizes company established procedures and policies. Nonetheless, they are predetermined and employees, including Bookout, may not change them. The front office is responsible for selling lottery tickets and western union services, preparing payroll, and making deposits. The front office also performs some bookkeeping related to sales and local events. This information is reported to Corporate.

Bookout and the assistant department manager perform payroll functions, bookkeeping functions, banking functions, and lane assignments for cashiers. Bookout establishes accountability for the cashiers by billing them based on the tills that are already at the registers. If a cashier needs additional money, anyone in the office can deliver it. The office manager determines if additional cashier support is needed. The office manager spends about 1% of her time relieving the cashiers and store manager on cash registers.

The office manager also oversees the service clerks, which are referred to as sackers. The sackers are responsible for gathering the carts and cleaning within the store. The office manager may instruct them to collect carts in the parking lot. The office manager is also responsible for coordinating breaks and lunches. Other employees may also inform employees when it is break time. Break times are determined based on the number of people on break and the service level needed at a given time of the day.

Bechtel testified that about four months prior to the hearing, the office manager recommended that Heather Butcher, a cashier, be promoted to an office clerk. Bechtel stated that he promoted Butcher based on the recommendation. Bookout also recommended that Anita Sighting, a cashier, be promoted to an office clerk. Bechtel also promoted Sighting. About six to eight weeks prior to the hearing, Bechtel asked Bookout if she would consider Stephanie Dolzall, a former cashier, for a promotion to the office. Bookout declined the offer so Bechtel did not pursue it. However, on cross-examination, Bechtel testified that he conducts independent investigations for promotions. No additional evidence was adduced regarding any promotions.

D. Produce Manager

According to the job description, the produce manager is responsible for the produce department within the guidelines established by Marsh Supermarkets, LLC. The produce manager for the Employer is John Boyce. In operating the department, he must follow the weekly company sales program and achieve predetermined budgeted gross profit figures. He must carry out the preparation of all produce records as required by the accounting and merchandising departments and must follow company policies related to weighing, pricing, packaging, and displaying merchandise. Boyce is accountable for inventory control. He is responsible for ordering products and maintaining them. There are two employees plus the produce manager in the produce department. Boyce makes the schedule for his department and is responsible for training employees. Boyce assigns tasks to his crew. Employees in this department work in the backroom, which is the cooler. The product is stored in this area. Employees do preparation work in this area such as cut melons, trim corn, and wrap products.

E. Deli/Bakery Manager

There are 12 to 13 employees in the Deli/Bakery Department. Deborah Hensley is the Deli/Bakery Manager. She oversees the deli/bakery department according to guidelines established by Marsh Supermarkets, LLC. More specifically, the deli/bakery manager is responsible for preparing food pursuant to the Board of Health rules. The deli manager is also responsible for training employees within the department to meet, greet, and serve customers. According to Bechtel, the deli/bakery manager is responsible for ordering and maintaining all merchandise within the department. The orders include frozen, bakery/deli, and dry good items. Bechtel states that Hensley has discretion regarding what items are ordered and how to maintain the product. The evidence is not clear on whether Hensley has a selection of items to choose from when ordering or whether she alone determines what items to place in the deli/bakery department. Moreover, Bechtel only testified that Hensley uses rotation, signage, tagging, and dating to maintain products. Hensley's job description states that she must adhere to corporate guidelines established by the deli/bakery merchandising department and the operations department. Furthermore, Hensley is responsible for providing accurate inventories as established by Marsh policy.

The record evidence disclosed that the deli/bakery manager has the authority to delegate her duties. She is responsible for the care and maintenance of the departmental equipment, such as the rotisserie chicken oven, the fryer, and the oven. The manager also schedules employees based on the sales budget. According to Bechtel, employees are selected based on their skills, service level, and availability. According to Bechtel, Hensley has recommended people for hire and has conducted the majority of the interviews in her department. Bechtel testified that she interviewed two people who were hired into her department. About a couple of months prior to the hearing, Hensley recommended that Bechtel hire Sharon Holcomb. They interviewed her and she was hired as a deli/bakery clerk. About six weeks prior to the hearing, Hensley recommended Raenetta Wickliffe and she was hired into the deli/bakery department. At one point, Hensley informed Bechtel that she wanted Stephanie Dolzall in her department and she was placed there. In another instance, Hensley informed Bechtel that she needed another

employee in the deli. Bechtel suggested Danyelle Stum, a cashier at that time. Hensley spoke with Stum and then informed Bechtel that she felt it would be a good fit. Bechtel moved Stum to the deli. Bechtel also testified that Hensley participates in the discipline of employees. For instance, throughout the day she gives verbal discipline. The record was devoid of any specific examples of discipline or whether the verbal discipline affects employees' job status.

F. Meat Manager

In the meat department, the classifications include a head cutter/journeyman meat cutter, a wrapper/part-time clerk, apprentice, and the department manager. Employees work in the backroom, which is the cooler, performing cutting, wrapping, and grinding. Pat Oppendahl is the meat department manager and he oversees the work of employees. He is responsible for the operations of the meat department and for training the employees. He achieves a budgeted gross profit established by the meat department merchandiser through order controlling and merchandising the product. He is responsible for inventory control. He is responsible for the preparation of all meat records and must follow company policies related to weighing, pricing, packaging, and displaying the products. According to Bechtel, Oppendahl has discretion in selecting how much space to utilize per sale item or non-sale item and on displaying the product in the case. For instance in merchandising the product, Oppendahl determines whether meat should be bundled, referred to as "family packs".

Bechtel testified that Oppendahl has the authority to assign work to employees in the meat department and can move them from one task to another. According to Bechtel, when scheduling Oppendahl is particularly mindful of what skills are needed. For instance, he needs to ensure that the meat is cut before he schedules the wrapper for work.

Bechtel testified that within the past six to eight months prior to the hearing Oppendahl recommended Tony Massey as an employee. On one occasion (date unknown), according to Bechtel, an employee was insubordinate to Oppendahl. Oppendahl either informed Bechtel that he removed that employee from his department or he told Bechtel that he did not want that employee in his department anymore. Bechtel attempted to discuss the matter with that employee but eventually terminated her for insubordination.

G. Dairy and Frozen Food Department Manager

The dairy and frozen food departments consist of the dairy and frozen food department manager and a clerk. Dale Stevenson is the manager. He is responsible for the operations of the dairy/frozen food department. He submits the orders for the departments and oversees the inventory. He is responsible for the profits in the departments and uses tagging, signage, and rotation to accomplish his goals. He has the authority to mark down, discard, and adjust shelf space. He has the authority to assign tasks to the clerk in his department.

H. Floral Manager

Dorothy Coyle is the floral manager. Coyle is the only person in the floral department. She is responsible for ordering all products for the department which may include plants,

flowers, vases, giftware, balloons, and ribbons. She is responsible for receiving, checking, pricing and handling of all products. Coyle determines what hours and days she will work.

I. General Merchandise Manager

The general merchandise department contains items such as health and beauty products, lawn and household goods, movies, toys, pillows and sheets. The general merchandise manager, Diana Trainor, is the only person in this department. She is responsible for the orders and inventory to achieve a high profit for the department. Trainer orders products from the corporate warehouse as well as from other vendors. Trainor is responsible for displaying items. She sets her own schedule.

J. Grocery Manager

The grocery department consists of about four employees plus the grocery department manager, Tommy McDonough. The grocery department manager is also referred to as the night manager. The grocery department manager is responsible for the operations of the store at night in the absence of the store manager and co-manager. Operations at night include activities within various departments and all employees report to McDonough after the store manager and co-managers leave. For instance, in the deli/bakery department, employees fry doughnuts and bake bread at night. Also, there is occasionally an inventory prep at night that McDonough oversees. McDonough is also responsible for security at night. He ensures that the doors and offices are locked. The grocery department manager, along with the store manager and co-managers, has keys to the facility and the alarm code. Within the grocery department, the manager is responsible for ordering, pricing, stocking, and rotating merchandise. He is also responsible for meeting weekly department budget and for inventory control. He is the only department manager that maintains a running record of inventory from all departments. In addition, he ensures that housekeeping is maintained such as cleaning the shelves and moldings, sweeping, mopping and sometimes waxing. McDonough has the authority to delegate these tasks. According to the job description, McDonough is responsible for the training, scheduling, evaluating, and consulting with employees in his department.

IV. DISCUSSION

A. Supervisory Issue

1. The Law

To determine whether an individual is a supervisor within the meaning of Section 2(11) of the Act, the Board examines: (1) whether the individual has the authority to engage in any 1 of the 12 enumerated powers listed in Section 2(11) of the Act; and (2) whether the exercise of such authority requires the use of independent judgment. NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574 (1994); NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 707 (2001). Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory indicia (e.g., “assign” and “responsibly to direct”) listed in Section 2(11); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and (3) their authority is held “in the interest of the employer.” Oakwood Healthcare, Inc., 348 NLRB 686 (2006). In Oakwood Healthcare, the Board held that “assign” for purposes of Section 2(11), means the “designation of significant overall tasks to an employee, not...ad hoc instruction that the employee perform a discrete task” which requires the use of independent judgment. Oakwood Healthcare, 348 NLRB at 689. The Board interpreted the 2(11) language “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible...and carried out with independent judgment.” Id. at 691. The Board further held that, for direction to be responsible under Section 2(11), the person directing the performance of a task must be accountable for its performance. Id. at 691-692. The Board further stated that judgment must actually arise above what is “routine or clerical.” Id. at 693. The Board also stated that the judgment must be independent. It noted that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” Id. However, the Board clarified that, “. . . the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” Id.

In excluding individuals from a unit based upon supervisory status, the burden of proof rests upon the party alleging that an individual is a supervisor. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001); Bennett Industries, 313 NLRB 1363 (1994). A lack of evidence is construed against the party asserting supervisory status. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999). Notably, a mere inference of independent judgment without specific support in the record is insufficient to warrant a finding of supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991). Rather, the record as a whole, must establish that an alleged supervisor’s role is something other than the routine communication of instructions between management and employees without the exercise of any significant discretion. McCullough Environmental Services, 306 NLRB 565 (1992).

Conclusory statements made by witnesses, without supporting evidence, does not establish supervisory status. Control Services, Inc., 314 NLRB 421 (1994); citing Sears,

Roebuck & Co., 304 NLRB 193 (1991). Evidence must be in the record to show that an alleged supervisor actually exercised at least one of the statutory indicia of a 2(11) supervisory. Id. In Control Services, the Board note that the record was devoid of any corroborating evidence to establish supervisory status and thus insufficient to support such a finding. It is well established that if an employee can discipline or has the authority to effectively recommend discipline then that employee is a supervisory status. In Ken-Crest Services, 335 NLRB 777 (2001), the Board found that the employees in question issued verbal warnings; however, the record was devoid of any written warnings that referred back to the previous verbal warnings. The Board found that the Employer failed to show that any actual consequences flowed from the verbal warnings. Thus the evidence was insufficient to establish supervisory status.

In the instant case, the Employer is asserting that individuals who hold the positions of department managers are supervisors within the meaning of section 2(11) of the Act, and thus, are ineligible to vote in any election directed in this case. The Employer, therefore, has the burden of establishing the supervisory status of those individuals.

2. The Parties' Contentions

There is no allegation that department managers possess the authority to hire, transfer, lay off, recall, promote, or reward employees or to adjust employee grievances. Rather, the Employer contends that the department managers are 2(11) supervisors because they have the authority to discipline and may effectively recommend hire, discipline, and promotion.⁸ The Employer also contends that the department managers responsibly direct employees and assign work using independent judgment. Moreover, the Employer argues that department managers are 2(11) supervisors because they evaluate employees after their probationary period. The Petitioner contends that department managers are not 2(11) supervisors and thus should be included in the unit found appropriate.

3. Floral and General Merchandise Department Managers

The evidence reveals that the floral department manager and the general merchandise manager are the only persons in those departments. Thus, they do not have any employees to responsibly direct or assign work. Furthermore, no specific evidence was proffered to establish that the floral department manager and/or the general merchandise manager exercised the authority to discipline employees or effectively recommend hiring, disciplining, and promoting employees. I find that the evidence is insufficient to establish that the floral department manager and the general merchandise manager are not statutory supervisors.

4. Meat and Deli/Bakery Department Managers

The Employer also contends that department managers could effectively recommend hiring or promoting employees. Bechtel testified in general that department managers can

⁸ In support of its position that the department managers are 2(11) supervisors, the Employer relies on criteria set forth in performance evaluations and job descriptions that refer to department managers as supervisors. However, it is well established that the title of a position is not controlling as to supervisory status but rather the authority vested in the position. Fleming Companies, Inc., 330 NLRB 227 (1999).

recommend employees for hire and promotion. Bechtel only provided specific examples regarding Oppendahl, the meat department manager, and Hensley, the deli/bakery department manager, recommending someone for hire or promotion. Conclusory statements alone are insufficient to confer supervisory status. Thus, I find that the evidence is insufficient to establish that department managers, with the exception of Oppendahl and Hensley, could effectively recommend hiring or promoting employees.

In regards to Meat Department Manager Oppendahl and Deli/Bakery Department Manager Hensley, Bechtel testified to several specific incidents pertaining to them effectively recommending the hire or promotion of an employee. According to Bechtel, Oppendahl recommended hiring Tony Massey in the meat department. Bechtel stated that he hired that employee. No other evidence was produced about this situation. Likewise, Bechtel testified Hensley, the deli/bakery department manager, recommended Sharon Holcomb and Raenetta Wickliffe for hire and both were hired. Based on a leading question, Bechtel testified that he hired Holcomb on Hensley's recommendation. However, the record reveals that Bechtel participated in the interview of this person. It is not clear from the record whether Bechtel hired the individual based solely on Oppendahl's or Hensley's recommendations.

In regards to promotions, Bechtel testified that Hensley had need for an employee in the deli section. He recommended Danyelle Stum. Hensley spoke with Stum and informed Bechtel that she felt it would be a good fit. Bechtel transferred Stum from a cashier to the deli section. However, the record is unclear as to whether Hensley's recommendation alone facilitated the promotion for Stum because on cross-examination, Bechtel stated he conducted independent investigations regarding recommendations for promotions. In another instance, Hensley informed Bechtel that she wanted Stephanie Dolzall to work in the deli. Dolzall was then promoted to the deli. There was no other evidence pertaining to how the promotion occurred.

Since it is unclear whether the meat department manager and deli/bakery department manager effectively recommended employees for hire and/or promotion, they shall be allowed to vote subject to challenge.

5. Department Managers⁹

a. Discipline and effectively recommend discipline of employees

In the present case, the Employer has not met its burden of establishing that department managers are statutory supervisors because they discipline and effectively recommend discipline. Bechtel made generalized statements pertaining to the department managers' authority to discipline and effectively recommend discipline. The record reveals that the Employer has a progressive disciplinary policy that includes suspension and termination. The record does not, however, state what form of discipline department managers have authority to issue. Notably, Bechtel was the only witness to testify about the department managers' authority to discipline and effectively recommend discipline. He simply testified in general that department managers

⁹ The Employer contends that department managers are statutory supervisors because they have the authority to discipline and effectively recommend discipline, direct employees, assign work to employees, and evaluate employees. Therefore, these factors are addressed in this section.

give verbal discipline to employees and could recommend discipline. On cross-examination, Bechtel stated that he conducts independent investigations when department managers recommend discipline. Moreover, no documentary evidence related to disciplinary matters by department managers was placed in the record. With the exception of the meat department manager, no specific evidence was even provided that reveals that any other department managers actually issued discipline or effectively recommended discipline.

In regards to the meat department manager, Bechtel's testimony was vague. Based on the evidence, it is unclear whether Oppendahl issued discipline to the employee by removing her from his department or if Oppendahl requested Bechtel to remove the employee from his department. However, the record evidence does reveal that after the incident with Oppendahl the employee spoke with Bechtel who subsequently terminated the employee for insubordination. It is unclear whether Oppendahl's actions lead to the actual consequence of the employee being terminated. There was no other evidence regarding the circumstances of this incident. Even assuming that Oppendahl verbally disciplined the employee, this is insufficient to establish supervisory status without evidence that other discipline, such as the termination, flowed from Oppendahl's verbal disciplinary action. See Ken-Crest Services, 335 NLRB 777 (2001).

Accordingly, I find that the evidence is insufficient to establish that any of the department managers are 2(11) supervisors based on the ability to discipline or effectively recommended discipline.

b. Responsibly direct employees using independent judgment

The Employer has not carried its burden of establishing that the department managers are accountable for their actions in directing employees in their respective departments. To establish accountability for purposes of responsible direction, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Oakwood Healthcare at 692. Evidence of actual accountability must be presented to prove responsible direction. Alstyle Apparel, 351 NLRB 1287 (2007); Golden Crest Healthcare Center, 348 NLRB at 731.

There is no record evidence of actual accountability. No evidence was proffered that any adverse actions were taken against a department manager because of insufficiencies in the work performed by any employee in the department. Therefore, it can not be established that department managers responsibly direct employees.

c. Assign work using independent judgment

As well, the Employer has not met its burden to establish that department managers assign work using independent judgment. The record evidence reveals only that department managers may instruct an employee to perform a specific task such as cleaning certain areas in the store, rotating products, assisting with inventory and unloading trucks, removing sale tags and affixing new tags. No evidence was adduced that the department managers use independent

judgment in assigning these tasks. Rather, the department manager simply selects an employee who works in the department. Employees know which tasks they are to perform. For example, the meat cutter will be scheduled to cut meat and the wrapper will be scheduled to wrap meat. Such a selection method does not involve a degree of discretion that rises above routine or clerical. The overall evidence does not support a finding that department managers assign work using independent judgment. See Oakwood Healthcare, 348 NLRB 686 (2006).

d. Evaluations

The record indicates that department managers evaluate new employees after their probationary period. Section 2(11) does not include “evaluate” in its enumeration of supervisory functions. It is only when evaluations affect the wages and/or job status of the employee that the individual performing the evaluations will be found to be a supervisor. Harborside Healthcare, Inc., 330 NLRB 1334 (2000). In the instant case, the Employer only offered conclusory statements that department managers’ evaluations of probationary employees may determine whether an employee remains employed. The record is devoid of any instances where a department manager actually performed an evaluation on a probationary employee and that such evaluation affected the terms and conditions of that employees’ job status. Thus, the evidence is insufficient to establish supervisory status.

B. Managerial Employee Issue

The Employer also contends that department managers should be excluded from the appropriate unit because they are managerial employees. Employees properly classified as “managerial” are excluded from the protections of the Act. NLRB v. Bell Aerospace Co., 416 US 267, 275 (1974). Managerial employees are defined as employees “who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer’s established policy.” Solartect, Inc., 352 NLRB 331, 333 (2008), quoting General Dynamics Corp., 213 NLRB 851, 857 (1974). For instance, in Simplex Industries, Inc., the Board found that a buyer was a managerial employee and thus excluded from the unit found appropriate because the employer had not promulgated any procurement policies to guide the buyer. As well, the buyer was not limited to ordering from an approved list of vendors and had the authority to change suppliers unilaterally. Moreover, the buyer was only limited by standards established by the quality control department.

Notably, the party seeking to exclude an individual as a managerial employee has the burden of establishing that exclusion. Rockspring Development, Inc., 353 NLRB No. 105 (2009). Contrary to Simplex Industries, Inc., in the instant case, the Employer has not established that department managers formulate the Employer’s policies or exercise discretion in the performance of their job independent of corporate policy. Rather, the record discloses that Corporate establishes policies and procedures, as well as gross profit figures, for each department. For instance, there are company policies related to weighing, pricing, packaging, and displaying merchandise. No specific evidence was offered that department managers could unilaterally change any of the established corporate policies. The evidence merely reveals that the department managers may customize their orders to fit their market but this process is still

within the parameters of established policies. The Employer has failed to present sufficient evidence to establish that department managers are managerial employees.

V. CONCLUSION

Based upon the record, it is concluded that the evidence was insufficient to establish that any of the department managers are managerial employees and thus, on this contention, they are not precluded from voting in the election. Additionally, it is concluded that the evidence was insufficient to establish that the department managers, with the exception of the meat and deli/bakery department managers, are statutory supervisors and thus all other department managers are eligible to vote in the election. However, the meat and deli/bakery department managers shall be allowed to vote subject to challenge.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Petitioner. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election. To be timely filed, the list must be received in the Regional Office **on or before August 30, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,¹⁰ by mail, or by facsimile transmission at 317-226-5103. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001.

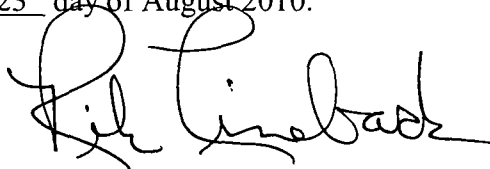
Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **September 7, 2010**, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is

¹⁰ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

accomplished by no later than 11:59 p.m. Eastern Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹¹ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, click on E-Filing, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

SIGNED at Indianapolis, Indiana, this 23rd day of August 2010.

A handwritten signature in black ink, appearing to read "Rik Lineback", written over a horizontal line.

Rik Lineback
Regional Director
National Labor Relations Board
Region Twenty-five
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204-1577

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¹¹ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.